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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 48.

ALEXANDER LATZKO, ET AL.,

Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Respondent.

No. 49.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Petitioner,

against

ALEXANDER LATZKO, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR ALEXANDER LATZKO, et al.

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Supreme Court of the United States

OCTOBER TERM, 1927,

Nos. 48 and 49.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL PROPER and EMIL HOCHSTEIN, as copartners, doing business under the firm name and style of N. LATZKO and A. POPPER,
Petitioners-Respondents,

THE EQUITABLE TRUST COMPANY OF NEW YORK, as trustee in bankruptcy, etc.,
Respondent-Petitioner.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF FOR ALEXANDER LATZKO, et al.*

Major Issues of Law Involved in Latzko and Rochling Appeals.

Appeals No. 34 (Rochling) and Nos. 48 and 49 (Latzko) present two major questions of law for the decision of this court:

*Italics throughout this brief are ours, unless otherwise indicated.

1. Whether this court will now reject the doctrine of *White* v. *Miners National Bank*, 102 U. S., 658, and the cases both in this and other courts following it for nearly fifty years, wherein it was laid down that the use of the words "for account of" in connection with negotiable instruments restricts their negotiability and retains the title to the check in the person for whose account it is deposited. If this court will follow its own decision in the *White* case, *supra*, it will not be called upon to consider the second major proposition.

2. Whether the principles laid down by this court in *Burton* v. *United States*, 196 U. S., 283, for the ascertainment of title to a check as between the depositor and his bank, limit the inquiry to the existence or non-existence of any express or implied agreement between the depositor and his bank, or, on the contrary, include in the inquiry the circumstances surrounding the deposit and the course of dealing between the parties as a basis from which the existence and non-existence of said agreement should be deduced.

The Briefs of the Respondent.

The briefs of the respondent in the *Rochling* and in the present case present an interesting contrast. In the *Rochling* case, the respondent found itself face to face with a situation, where the checks involved on the face thereof bore the words of restriction, but where the course of dealings between depositor and his bank and the circumstances surrounding the deposit of said checks were favorable to respondent's contention that the title to said checks passed to the bank. Accordingly, the respondent there adopted the standpoint and strenuously argued that the relationship between the depositor and his bank was a matter of intention of the parties as evidenced by facts showing the course of dealing between them and circumstances

surrounding the deposit, and if those facts tended to prove a relationship different than that implied by the form of the check, the facts governed and not the form.

In the *Latzko* case, where the admitted course of dealing between the parties and the circumstances surrounding the deposit are unfavorable to respondent's standpoint, it adopted the argument that the title to the check as between depositor and his bank is to be determined by the presence or absence of an agreement between them, conferring or withholding a right upon depositor to draw at once against his deposits of negotiable instruments: to wit, without waiting until they are actually collected by his bank. The respondent insists that the very same cases on which it bases its argument in the *Rochling* case establish for the *Latzko* case a different doctrine rejecting entirely the examination of facts showing the course of dealing between the depositor and his bank and the circumstances surrounding his deposit. This shifting stand of the respondent is significant particularly as it freely admits that the *Latzko* appeals "essentially present the same questions as are presented" in the *Rochling* case (Respondent's Latzko Brief, p. 2). While the predicament of the respondent is appreciated, yet it should not lead this court to two different results but should rather facilitate it in recognizing as the true test of the title to negotiable instruments deposited by a depositor with his bank, the circumstances surrounding the deposit and the course of dealing between the parties, which may or may not be evidenced *inter alia* by an express or implied agreement between the depositor and his bank.

Respondent's Brief in the Latzko Case.

The statement of facts of the respondent in the Latzko appeals is somewhat novel, inasmuch as it rejects the accepted method of stating the facts impartially, reserving the contended discussion thereof to the argument. The respondent's argument begins with the facts them-

selves. Hence, the necessity arises of answering some of these arguments at this stage of this brief, and of reserving the rest of them for a later part thereof.

1. At page 5 the respondent marks what it terms "Erroneous statement of facts in petitioner's brief". We are unable to discern said error. The words "for collection" are used in connection with checks in two well established meanings. One is, to imply restriction on their alienation. The second is, to obtain the cash proceeds thereof. We have used that on page 3 of our former brief in the second sense. Hence, its use by us was legitimate.

2. On page 6 respondent attempts to intimate that it was material for us to show that no interest was received by petitioners upon their deposits with the bankrupts. This fact is entirely immaterial to the case of the petitioners, but is vital to the case of the respondent. We merely pointed out that this material element in favor of the respondent present in the *Rochling* case is absent in the *Latzko* case, thus strengthening the position of the petitioners, and correspondingly weakening that of the respondent. It is enough to view pages 8, 20 and 21 of the respondent's brief in the Rochling case in order to appreciate the importance to the respondent's case of the interest bearing fact herein discussed.

3. On pages 6 and 7 of its brief, the respondent makes a further attempt to obliterate another important difference in facts between the *Rochling* and *Latzko* cases. In the *Rochling* case, the depositor desired his account credited with certain sums on a certain date, which was the day of the deposit of negotiable instruments and was in point of time the day before they were collected through the clearing house. This constituted an important fact showing the sale of said checks by depositor to his bank. In the *Latzko* case, the petitioners did not

desire any credits upon any day. The respondent argues that "It is to be presumed that international bankers dealing in transfers of large credits are at all times aware when they *may expect* credits to be placed to their account and to be made available for their use." We do not know anything about any such presumption, but even if it is assumed for the sake of the argument to be true, then the record in the case at bar shows that the petitioners expected credits to their account *only after the bankrupts received through the clearing house the proceeds of the negotiable instruments deposited with them by the petitioners.* It is admitted by the respondent:

> "That your petitioners did not draw upon said K. N. & K. against said account aforesaid *before the collection* by said K. N. & K. of the moneys due upon such evidence of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., p. 22).
>
> "That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection or otherwise, as a deposit of cash, *nor as an immediate credit* open to petitioners by said K. N. & K. upon receipt of any evidence of debt * * *" (R., pp. 22, 23).

At page 7 respondent queries the utility of pointing out the distinction between the cashier's check and a check drawn in another bank. The distinction was made because of the argument advanced below by the respondent and discussed at length on page 13 of our main brief. If respondent decided to abandon said argument now, the distinction, of course, becomes unnecessary, but forms no ground for reproach to us.

Points of Agreement With Respondent.

Respondent agrees with us:

1. That the petitioners duly fulfilled the duty of tracing the proceeds of their checks to the specific funds in the hands of the trustee in bankruptcy.

2. That the Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners, did not constitute a part of the contract controlling the title of said parties to said check (Respondent's Brief, p. 38).

3. That in the eye of law there was no distinction in the facts herein in so far as they deal with either Goldman-Sachs' check for $15,000 or the National City Bank's check for $1,294.00 (Respondent's Brief, p. 38).

4. That in the eye of law it is immaterial whether either or both of said checks were cashier's checks or depositor's checks drawn in another bank (Respondent's Brief, p. 7).

5. That in the eye of the law it is immaterial whether Goldman-Sachs & Company and the National City Bank in depositing the checks herein with the bankrupts for the benefit of the petitioners were acting as principals or as agents for the petitioners.

6. That the relationship between the depositor and his bank depends on the intention of the parties, to be ascertained as a matter of fact (Respondent's Brief, pp. 8, 17).

7. That *in the absence of any facts* showing the nature of the relationship between the depositor and his bank, or the circumstances surrounding the deposit, or the course of dealing between the parties, a deposit of negotiable in-

struments generally endorsed by a depositor to his current checking account in a bank would result in the relationship of debtor and creditor (Respondent's Brief, pp. 16, 17).

Points of Disagreement With Respondent.

We consider the respondent to be in error on the following propositions of law:

1. That there is a general presumption that a relationship of debtor and creditor exists between any depositor having a current checking account in a bank and the bank wherein said account is had.

No such general presumption exists. Such principle is applied *only* in those cases where negotiable instruments, generally endorsed, are deposited by depositor to his current checking account and *no facts are submitted* showing either the terms of depositor's agreement with his bank in regard to said account or the circumstances surrounding said deposit or the course of dealing between the depositor and the bank.

Furthermore, once the respondent conceded that the relationship between a depositor and his bank is a matter of intention it thereby negatives all of its argument because there could be no presumption of law as to the intention of the parties; that being in every case a matter of fact.

2. That in order to rebut said presumption the depositor must show that he has no right to draw against his deposits of negotiable instruments to his current checking account prior to their collection by his bank by virtue of some express or implied agreement with his bank.

Whether a depositor has or has not a right to draw is a legal conclusion to be deduced from the facts showing the nature of the relationship between depositor and his bank or from the circumstances surrounding the deposit, or

from the course of dealing between the parties. The presence or the absence of an express or implied agreement between the depositor and his bank is merely *one* of many other facts or circumstances which help to establish or refute the conclusion that the depositor did or did not have said right to draw.

3. That the restrictive meaning of the expressions "account of" and "favor of" is limited to the instances where the same are used in the endorsements written upon the backs of negotiable instruments.

We have shown in our main brief that an endorsement does not cease to be such because it happens to be written on the front of negotiable instruments or in a memorandum accompanying the same, and cited many authorities in support thereof (pp. 18 and 19). We also submit that it is immaterial whether said expressions are used between the endorsers or between depositor and his bank. Could not a depositor tell his bank, *even orally,* that he deposits certain checks "for collection" and thereby retain the title to the proceeds thereof? Would it make any difference in law, if said direction was written by the depositor on the back of said checks or in accompanying memorandum, or if it were oral? While all these distinctions would be important in the case of third parties, they have no bearing whatsoever upon relationship between depositor and his bank, which is the relationship this court is called upon to consider in the case at bar.

4. That the unambiguous and settled, legal, restrictive meaning of expressions "account of" and "favor of" can be varied by facts showing surrounding circumstances to the extent of proving that they were used in the case at bar in a non-restrictive sense.

We do not know of any authority that supports this proposition and cases cited by the respondent do not support its contention.

5. That the alleged facts, to wit: that deposit herein was made by the petitioners themselves and to their current checking account with the bankrupts, entitle the court to reject the settled restrictive meaning of the expressions of "account of" and "favor of".

In our humble opinion this argument of the respondent is a complete *non sequitur*. Moreover, the facts at bar conclusively establish that the deposit of the checks herein was made not by the petitioners but by the New York banks upon instructions from their correspondent banks abroad, and that there is no evidence whatsoever that the New York banks in making said deposit knew that the petitioners had a current checking account with the bankrupts.

POINT ONE.

Respondent admits that the Circuit Court of Appeals erred in its holding as to the Goldman-Sachs & Company's check for $15,000.

On page 38 of its brief respondent concedes the Circuit Court of Appeals "misapprehended the problem" and that there is no distinction between the restrictive statement whether it appears on the face of the check or is contained in a memorandum accompanying the same. Respondent states there that:

> *"If the phrase was notice to the bankrupts of anything, it was just as much notice to the bankrupts whether it appeared on the face of the check or in a covering letter to them."*

Assuming, then, that the Circuit Court of Appeals was right in holding that the title to the National City Bank's check for $1,294 was in the petitioners at the time of the

bankruptcy of Knauth, Nachod & Kuhne, the decision of said court in so far as the check of Goldman-Sachs & Company for $15,000 is concerned must be reversed as erroneous upon admission of the respondent herein, that there is no distinction in facts or in law between the two checks involved in these appeals.

POINT TWO.

The respondent misunderstands the decision of this court in BURTON v. UNITED STATES.

The BURTON case lays down no general presumptions, but holds that certain facts would show the intention of the bank and its depositor to establish the debtor-creditor relationship.

The uncontradicted facts at bar show that the intention of the bankrupts and the petitioners was not to establish the debtor-creditor relationship between them.

The Circuit Court of Appeals as a result of an error which we will explain at a later part of this brief concluded that the petitioners pleaded that they caused the National City Bank and Goldman-Sachs & Company, *as their agents,* to deliver checks herein involved to the bankrupts. No such plea was made by the petitioners, nor was such fact ever conceded by them in the course of this litigation, or otherwise. At this stage of the argument, however, we do not consider it important to discuss the meaning of the verb "caused" as used by the petitioners in their petition. "Caused" is a synonym of "occasioned" and, standing alone, does not show the capacity in which petitioners caused the delivery of said checks to the bankrupts. On the other hand, the facts in the record herein

completely refute the contention of the respondent that *the checks herein were delivered by the New York banks as agents for the petitioners.*

A.

Basic error of respondent.

The fundamental error of respondent's argument as advanced under its Point I is that it assumes that in *Burton* v. *United States,* 196 U. S., 283, this court laid down a principle that a general presumption exists in favor of debtor-creditor relationship between the bank and its depositor, and that there is a duty on the depositor to refute this *prima facie* presumption, if he claims that any other relationship between him and his bank.

We have carefully examined the decision of this court in said case and in other cases and find no ground whatsoever for this contention. The rule as to the relationship of a bank and its depositor is that it is a matter of intention to be deduced from the facts in each particular case.

In the *Burton case,* supra, this court said:

> *"There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction* between the parties—the defendant and the bank—making it other than such as the law would imply *from the facts already stated."*

This statement, recently approved by this court in *Douglas* v. *Federal Reserve Bank,* 271 U. S., 489, shows that the doctrine of the *Burton case* is as follows:

1. That where a depositor has a right to draw immediately against the deposit of checks to his current checking account with the bank, and he deposits checks therein generally endorsed, these facts show the intention to establish the relationship of debtor and creditor between his bank and him.

2. That notwithstanding such state of facts different intention may be established by the evidence.

3. Such evidence may consist in an agreement, express or implied.

4. Such evidence may consist of an understanding proved either by the established course of dealing or the circumstances surrounding the deposit.

In the recent case *In re Jarmulowsky,* 249 Fed., 319, the Circuit Court of Appeals for the Second Circuit unanimously said, at page 321:

> "Whether there was any other or special agreement made *is a question of fact.*"

Chief Justice Fuller in *St. Louis & San Francisco Ry. Co.* v. *Johnston,* 133 U. S., 566, discussing title to a check; said at page 576:

> *"The question was one of fact rather than of law.* * * *"

In a recent work dealing with this question (Brady on Law of Bank Checks, 1926), it is stated at page 467:

> "As stated above the question whether title to a check passes upon its deposit in a bank depends to a large extent upon the unexpressed intention of the parties *as evidenced by the attending circumstances.*"

In the *Burton case,* this court quoted with approval the following statement from *Metropolitan National Bank* v. *Loyd,* 90 N. Y., 530:

> "If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, *but*

> *there is no evidence upon which such facts could be established, nor is it consistent with the dealings between the parties, or any of the admitted circumstances."*

For further authorities we refer the court to Point Five in our main brief, and particularly to pages 53, 54, 55 and 56 thereof.

The true test is not as contended by the respondent (its Brief, p. 16).

> "Is there any evidence to show that as between banker and depositor a relationship different than that of debtor and creditor was intended to be created",

but

Is there any evidence from which the court may discern the intention of the parties as to the title to the deposit of checks.

If there is no evidence, the law will imply the relationship of debtor and creditor. If there is evidence, that evidence *must be considered,* whether it consists of an express or implied agreement, a course of dealing or other circumstances surrounding the deposit.

Apparently, the respondent itself practically conceded this standpoint of the petitioners. It said at the end of page 17 of its brief:

> *"In the absence of evidence to the contrary,* that intention is presumed by the Burton case to contemplate a debtor-creditor relationship."

Again at page 8 of its brief respondent says, in respect to the appeals in these cases and in the Rochling case:

> "The only question present in all of these cases is what was the relationship *as a fact* between the bankrupts and their depositors."

At page 16 of its brief respondent admits that

> "Of course, varying circumstances have been held sufficient to indicate that the relationship between bank and depositor *was not intended* to be that of debtor and creditor upon the deposit of checks, and that the *relationship was intended* to be that of bailor and bailee or principal and agent."

If the relationship between a depositor and his bank depends upon the intention of the parties and that, in turn, as conceded by the respondent, is a matter of fact, it is clear that no legal presumption may exist as to such relationship, because the law may not indulge in any presumption as to such matter of fact as the intention of the parties in any particular instance. That intention, of necessity, must be deduced by the court in every particular case from the facts submitted to it by the litigants.

If the facts submitted by them show nothing else but a maintenance of a current checking account by depositor with a bank and a deposit of negotiable instruments generally endorsed by the depositor to his account then the legal relationship established by such facts is that of debtor and creditor. This result is arrived at in such cases not because of the existence of any presumption but because said legal conclusion logically follows from the state of facts proved to the court.

B.

Respondent intentionally disregarded uncontradicted facts showing that the relationship of principal and agent existed between bankrupts and petitioners.

Confronted with admitted facts constituting crashing evidence that the relationship herein between the petitioners and bankrupts was that of principal and agent, respondent adopted a simple method of evading the issues

herein. It first of all, invented a non-existing theory of a general presumption in favor of debtor and creditor relationship, and, then, secondly, entirely omitted to discuss the uncontroverted facts showing the intention of the bankrupts and the petitioners to establish between them a relationship other than that of debtor and creditor. The material facts admitted at bar are these:

1. That both checks were delivered to the bankrupts either bearing on the face thereof or accompanied by restrictive instructions.

2. There was "no agreement with said K. N. & K. to treat evidences of debt deposited with said K. N. & K. for collection or otherwise as a deposit of cash, nor that an immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt" (R., 6).

3. That the course of dealing between the bankrupts and petitioners was as follows:

> "That petitioners did not treat evidences of debt, deposited with said K. N. & K. for collection and otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K." (R., 6, 7).
>
> "That your petitioners did not draw upon said K. N. & K. against said account as aforesaid, before the collection said by K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., 22).

"That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K. N. & K., petitioners had a credit balance with said K. N. & K. amounting to several thousand dollars and were not then, and have not been at any time since then, and are not now, indebted to said K. N. & K. or to said Receiver" (R., 9).

The effect of fact (1), *supra,* is that the checks herein were received by the bankrupts for collection. *White* v. *Miners National Bank,* 102 U. S., 658, and cases preceding and following it (see pp. 18-32 of our main brief).

The effect of fact (2), *supra,* is that there either was an agreement to treat the deposits of the petitioners with the bankrupts in some manner other than as "deposits of cash" or as "an immediate credit", but such agreement was not proved and is not in evidence; or that in the absence of such agreement a course of dealing between the parties showing their intention should naturally govern the title to the checks herein.

The effect of fact (3) is to show that the course of dealing between the parties herein completely excluded the application to the relationship herein of the doctrine of debtor and creditor. We refer the court for detailed discussion of this point to pages 56-70 of our main brief.

C.

Respondent's authorities support the contention of petitioners.

At pages 11-16 respondent traces the development of the doctrine in the Burton case and shows that the law will not imply relationship of debtor and creditor, *unless the intention of the parties is that the deposit of checks should be treated in the same manner as a deposit of cash money.* To this effect it cites *Foley* v. *Hill,* 2 H. L., 28, and *Bank of Republic* v. *Millard,* 10 Wall., 152, in which deposits

of moneys were involved and *Cragie* v. *Hadley*, 99 N. Y., 131, and *Metropolitan* v. *Loyd*, 90 N. Y., 530, concerned with deposits of checks.

In the *Cragie case, supra*, the court said:

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, *of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks*, is immediately vested in and becomes the property of the bank, is not open to question (*Commercial Bank of Albany* v. *Huges*, 17 Wend., 94; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y., 530)."

Many other cases are cited in our main brief (pp. 60-64), but the point is best illustrated by the two following quotations.

In *Standard Trust Co.* v. *Commercial Natl. Bank*, 240 Fed., 303, where the checks were accepted by the bank as the equivalent of cash, the court said at page 307:

> "When the payees deposited this check, *it was accepted as the equivalent of cash.* They were allowed to draw upon it the same as though they had made a deposit of so much money, and in point of fact they did check it all out the same day. * * * We deem it not doubtful that the effect of the transactions under review was to make the bank the owner of this check, for value, and to clothe it, as such owner, with all the rights of a holder in due course of a negotiable instrument. *Armstrong* v. *Bank*, 133 U. S., 433; *Burton* v. *United States*, 196 U. S., 283."

In *Goshorn* v. *Murray*, 197 Fed., 407, where there was no testimony that checks and vouchers were received as a deposit of money, the court said at page 411:

> "All these are perhaps slight circumstances tending to show that the checks and vouchers were received for collection only and not as a deposit only, but, *taken with the fact that there was no testimony tending in the slightest degree to show that the checks and vouchers were received as a deposit of money, the conclusion cannot be avoided that the deposit was for collection and the Cosmopolitan National Bank was the agent for their collection, and the relation of debtor and creditor did not obtain between the Cosmopolitan National Bank and the complainant.*"

In the *Loyd case,* supra, the court said:

> "He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed and *the right of Murray to command payment at once was of the very nature and essence of the transaction.*"

In the case at bar, the admitted facts show that there was no agreement between the petitioners and the bankrupts to treat their deposit of checks *as deposit of cash* nor *as an immediate credit.* The course of dealing between the parties establishes that they never as a matter of fact treated the deposits of the petitioners as deposits of cash or as an immediate credit, and that the petitioners never drew upon the bankrupts before the collection of said evidences of debt as were deposited by them with the bankrupts. Hence, the deposits by the petitioners of their negotiable paper with the bankrupts, were never intended by them to constitute or be equivalent to a deposit of cash, nor as an immediate credit (R, 6, 7, 9, 22).

"The very nature and essence of the transaction" necessary to establish a relationship of debtor and creditor between a depositor and his bank are, thus, absent in the case at bar.

This being the intention of the parties two things follow:

1. That the *Burton case* and the cases preceding and following it, dealing with the deposit of checks treated as cash, do not apply to the facts at bar.

2. That the implication of law arising where checks are deposited as cash is excluded here by the intention of the parties that the deposits herein should not be treated as cash or as an immediate credit.

It was so held by this court and the New York Court of Appeals (see our main brief, pp. 66-70) in

St. Louis & San Francisco Ry. Co. v. *Johnston,* 133 U. S., 566, 573, 574;
Scott v. *Ocean Bank,* 23 N. Y., 290, 291.

D.

Replying to respondent's argument.

The respondent quotes Special Master to the effect that there was burden upon the petitioners to prove a *special agreement,* showing that they had no right to draw before collection (Its Brief, p. 20). The opinion of the Special Master presents unquestionably an erroneous view point of law. He has adopted wholesale the erroneous doctrine of the respondent that there is a general presumption in favor of the debtor-creditor doctrine and that there was a duty upon the petitioners to rebut that presumption and that it could not be rebutted in any other way except by the proof on the part of the petitioner of *a special agreement,* showing that they had no right to draw before collection. This point of view was rejected by the District Court and the Circuit Court of Appeals, and is clearly untenable in view of the previous discussion herein of these questions of law.

In support of Master's opinion respondent cites a portion from the judgment of Hand, C. J., *In re Jarmulowsky,*

243 Fed., 632, but judiciously omits the most material part of said quotations which commences as follows:

> *"The banks right,* however, depends upon the depositor's immediate and unconditional right and not merely as a favor to draw upon the deposit * * *."

It is clear that Hand, C. J. (then D. J.), put the burden of proof *upon the bank* and not upon the depositor as the respondent wants this court to believe.

As Pitney, J., said in *Perth Amboy Gas Light Co.* v. *Middlesex County Bank,* 60 N. J. Eq., 84, 90:

> "If a depositor deposits a check or draft on a third party * * * *in the absence of an understanding* * * * *it is a mere bailment."*

In its eagerness to fasten upon the petitioners the non-existing burden of proof, the respondent alleges that:

> "Petitioners have failed to sustain the burden of proving *the absence of such right."*

Since when under our system of pleading and proof, a claimant must establish a *negative fact.*

This is not a case where negotiable instruments, *generally* endorsed, are deposited by customer with his bank to his current checking account. In this case negotiable instruments, *restrictively* endorsed, were deposited with the bank by third parties either on or without instructions to do so emanating from the depositor. Hence, *prima facie,* the deposit herein is restrictive and the title remains in the depositor until the proceeds of said deposit are collected by the bank and mixed with its general funds.

If the respondent, who stands in the shoes of the bankrupt bank, desires to show that for some reason the words of restriction could have been disregarded by the bankrupts, the burden is upon it to establish this fact by prov-

ing, *inter alia,* that the petitioners had an immediate and unconditional right to draw upon their deposit of negotiable instruments with the bankrupts before the bankrupts collected the proceeds thereof.

In conclusion of its Point I respondent concedes that the restrictive instructions accompanying the checks herein were not present in the *Burton case,* but contends that said instructions were not meant to be used as words of limitations under the peculiar circumstances of the present case. To avoid repetition we will discuss this matter under the next point. Here, we merely wish to point out the inconsistency of the respondent. In trying to fasten upon the petitioners the debtor-creditor doctrine it ignores and rejects the circumstances and the course of dealing between the parties herein, but in attacking a settled meaning of restrictive expressions used in connection with the checks at bar, it relies on the circumstances and course of dealing in attempting to convince this court to vary said settled restrictive meaning and to impart to it a fanciful interpretation unsupported by the facts herein.

POINT THREE.

Both the surrounding circumstances and the settled legal and banking meaning of the expressions "for account of" and "favor of" establish beyond any doubt that said expressions were used herein in their customary restrictive sense.

Since the argument of this case in the Circuit Court of Appeals, the respondent made considerable progress toward acknowledging as still in force the doctrine announced by this court in *White* v. *Miner's National Bank,* 102 U. S., 658, and in the cases preceding and following it.

The respondent now concedes (its brief, p. 25), that the expressions "account of" or "favor of", when used in

connection with negotiable instruments, imply restriction upon their negotiability, but still contends that the *White* case and the subsequent cases do not apply to the facts at bar for either or all of the following reasons:

(1) That in the *White* case and the subsequent and preceding cases the court dealt with the use of the restrictive terms "account of" and "favor of", as a part of the endorsement, and had to determine the rights as between the endorsers. In this case the words of restriction are not used on the back of the negotiable instruments but either on the face or in the accompanying written instruments and that the parties before the court are not endorsers but the payees and their depositor.

(2) That although the settled legal meaning of "account of" and "favor of" is restrictive and the expressions are unambiguous, the court must take into consideration the circumstances surrounding the delivery of the negotiable instruments herein in determining the meaning of those expressions in the case at bar.

(3) The circumstances surrounding the delivery of negotiable instruments in this case show that said expressions of restriction were not used by the parties herein in their customary sense and established legal meaning.

We will now consider *seriatim* the respondent's argument as outlined above.

A.

The expressions "account of" and "favor of" have restrictive meaning whenever used, said meaning not being limited to negotiable instruments. They remain such whether used between endorsers or a bank and its depositor.

A considerable part of respondent's argument is devoted to attacking the decision in the *White* case (*supra*), and the opinion of the Circuit Court of Appeals, on the ground that in the *White* case the court dealt with an inscription

on the back of the negotiable instrument, and that the Circuit Court of Appeals used the word "endorsement" in its larger sense, and not in its limited sense, to wit, that of an assignment of a negotiable instrument.

We have shown in our main brief (pp. 18 and 19), that an endorsement does not cease to be such because it happens to be written on the front of a negotiable instrument or in a memorandum accompanying the same, and cited many authorities in support of this position. A repetition of said argument here, which was not answered by the respondent, is deemed superfluous.

The expression "account of" and its companion expression "favor of" import restrictive meaning irrespective of their use. In other words, the very plainest meaning of these expressions is that something is being done for the benefit of some other party and not the parties who are the actors in any particular transaction.

On pages 18 to 32 of our main brief we have discussed at length the use of said restrictive expressions in the *White* case and cases preceding and following it in connection with negotiable instruments. All of these cases lay down the doctrine clearly stated by this court in the *White* case. It said at page 660:

> "*The plain meaning of it is,* that the acceptor of the draft is to pay to the endorsee *for the use of the endorser.* The endorsee is to receive it *on account of the endorser. It does not purport to transfer the title* or the ownership of the money when received."

In *Baranowsky* v. *Guaranty Trust Company,* N. Y. Law Journal (November 12, 1921), Mr. Justice Lehman (now of N. Y. Court of Appeals), said:

> "It has been frequently held that an indorsement of a negotiable instrument 'for the account' of the indorser makes the indorsee not the full owner of the instrument, but merely the indorser's agent for col-

lection. *From the very nature of the contract embodied in the negotiable instrument these words can have no meaning except that the party primarily liable on the instrument should pay them over only for the benefit of the person making the restrictive indorsement.*"

In *M'Kinstry* v. *Pearsall*, 3 Johnson (N. Y.), 319, New York Court of Judicature, then presided over by Kent, C. J., considered the effect of a receipt reading as follows:

> "Received of Captain E. Smith, 50 barrels of provisions, for account of David M'Kinstry.
>
> Robert Pearsall."

The court said at page 320:

> "With respect to papers of this kind, the courts have permitted the party to show mistake, fraud and imposition, in obtaining them. It is not necessary in this case to go so far, as *the receipt itself is perfectly equivocal;* and from the mere reading of it, no one could say whether the provisions were received to go on an account held by the defendant against the plaintiff or whether the defendant meant only to acknowledge that, though the provisions were received from Captain Smith, *they were received by the defendant for safe keeping, for or on account of David M'Kinstry. I should understand the receipt to import the latter,* for several reasons; because there is no sum mentioned at which they were received, *and because 'for account' denotes, with more propriety, the ownership of the property, rather than that they were received on an account against him.*"

We have never argued, as the respondent wants this court to believe (its brief, p. 25), that a word or phrase used under one set of circumstances always must have the same meaning, although used under wholly different

circumstances or for another purpose. We merely pointed out, and still urge upon this court, that the expressions "account of" and "favor of" in their very nature and taken in their simplest meaning imply that an act is being done by someone not as a principal actor but merely as an agent for someone else, and that the beneficial ownership or interest in the property subject to such an act is in the principal and not in the agent.

This matter was discussed at great length in our main brief at pages 29 to 32. We have stated there that in order to succeed in its argument the respondent must not only convince this court that said expressions were used by the New York banks or the petitioners not merely as indicative of the bookkeeping account to which the checks delivered by them to the bankrupts were to be charged, but that the proceeds of the checks in question were intended by them to be paid to the bankrupts *for the beneficial use of the bankrupts and not for the beneficial use of the petitioners.* That far, of course, the respondent cannot push its argument. Not being able to bring it to a logical conclusion it should have had the courage to acknowledge its futility and inapplicability to the facts at bar.

The respondent takes several pages of its brief to argue that there is a fundamental distinction between the case where restrictive instructions are used between endorsers or between a bank and its depositor. The respondent contends that in so far as the endorsers are concerned no question of the actual relationship between the endorsee and the third party exists, intimating that the endorsees in this case are the bankrupts and the third party the petitioners.

The endorsees in the case at bar were the bankrupts, to wit, a bank wherein a current checking account was maintained by a third party, to wit, the petitioners. The argument of the respondent loses sight of an undisputed fact that whatever might be the actual general understanding between a depositor and his bank the depositor is always at liberty to impart new terms (either more liberal or

more restrictive) to any particular deposit made by him to his said account from time to time.

The respondent takes it for granted that if an understanding is established between the bank and its depositor as to how his deposits are to be treated it is a sort of a permanent institution which could not be changed by either party in any particular instance. The assumption is, of course, contrary to the actual state of facts existing throughout the country between depositors and their banks and the law governing their relationship.

The depositor is always at liberty to accompany any deposit by such instructions as he may desire, and if his bank accepts the deposit it is bound by said instructions, its only privilege being to reject the deposit on the terms tacked on to it by the depositor.

> "Sec. 208. *Instructions accompanying a deposit, and coming from the proper authority, must be carefully attended to.* When the depositor orders his money to be put on one of his accounts, or to be applied to take up a particular check or note, or to be transmitted to a certain person, *or whatever special direction he may give,* the bank must obey it if it receives the deposit at all."
>
> *Morse on Banks & Banking* (5 Ed.), Vol. 1, page 439.

In the case at bar, assuming for the sake of argument but not conceding, that the New York banks acted merely as agents for the petitioners, the petitioners choose to tack on to their deposit restrictive directions in the case of the check for $1,294 by inserting the same in the text of the check, and in the case of the check for $15,000 by inserting the same in an accompanying memorandum. Accordingly, whether this court will consider the bankrupts and the petitioners as endorsers or as a bank and its depositor, the actual relationship between them in regard to this particular deposit is the same, to wit, the deposit was re-

strictive and the depositor retained beneficial ownership in the two checks in question until such time as the bankrupts collected the proceeds thereof through the clearing house. The moment the respondent admitted that the expressions "account of" and "favor of" are restrictive and are equivalent to a direction for collection (*Commercial Natl. Bank* v. *Armstrong*, 148 U. S., 57), it lost its case.

Unless the respondent takes the stand that a depositor who has a general checking account, can *never* deposit any negotiable papers to his account accompanied by a restrictive direction, such as "for collection" or "account of", etc., it fails in its argument. That extreme position the respondent found itself unable to take and thus failed in the acid test of the applicability of its argument to the facts at bar.

B.

Respondent seeks by surrounding circumstances not to explain but to directly contradict the restrictive meaning of the expressions "account of" and "favor of." Its authorities do not apply to the case at bar.

The respondent seeks to induce this court to consider the circumstances surrounding the delivery of checks in question by the National City Bank and Goldman-Sachs & Co. to the bankrupts, because these circumstances, in the opinion of the respondent, merely help *to explain* the meaning of said words and not to vary or contradict it.

What the respondent extensively seeks, through its so-called explanation, is to show that, although said expressions are unambiguous and their settled legal meaning is restrictive, they were used in the case at bar in a non-restrictive sense. If that is not a request to this court to vary and contradict by extraneous parol evidence written instruments, we do not know what request may so be, and a better situation where parol evidence rule should govern cannot be easily imagined.

The rule as to the introduction of surrounding circumstances to explain written instruments is stated in *Corpus Juris*, as follows:

> *"Accordingly where the instrument is clear and unambiguous on its face, and no intimation is given of a disclosure of a latent ambiguity, no evidence is admissible to give to it a construction other than that which is plainly expressed. It must be interpreted according to its terms, and it will be enforced without resorting to proof of the surrounding circumstances"* (22 C. J.), page 1189.

In support of this rule a mass of authorities are cited and some of the federal cases indicated are these:

> *Culver* v. *Wilkinson*, 145 U. S., 205;
> *Thompson* v. *Knickerbocker Life Ins. Co.*, 104 U. S., 252;
> *Meredith* v. *Picket*, 9 Wheat., 573;
> *Morris* v. *Chesapeake, etc., S. S. Co.*, 125 Fed., 62 (*Certiorari* denied, 203 U. S., 592);
> *United Eng., etc., Co.* v. *Broadnax*, 136 Fed., 351 (*Certiorari* denied, 197 U. S., 624).

In the *White* case (*supra*), this court held that the expression "account of" and its companion expression "favor of" are not ambiguous. It said at pages 660, 661:

> *"The language of the endorsement is without ambiguity and needs no explanation either by parol proof or by resort to usage. * * * If this be a sound view of the legal effect of the written endorsement, neither parol proof nor custom can be received to contradict it."*

In support of its said doctrine respondent cites the following cases:

U. S. v. *Bethlehem Steel Corp.* (1906), 205 U. S., 105;
Middleworth v. *Ordway* (1908), 191 N. Y., 404;
U. S. v. *Chamberlin*, 219 U. S., 250, 262;
Price v. *U. S.*, 269 U. S., 492;
Central Coal & Coke Co. v. *Good & Co.*, 120 Fed., 793, 799.

In *U. S.* v. *Bethlehem Steel Corp.* (*supra*), this court, as a reason for admitting surrounding circumstances to explain the contract under its consideration, said at page 118:

> "While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet *we think that much light is given as to the true meaning of language that is not wholly free from doubt* by a consideration of the correspondence between the parties before the final execution of the contract itself."

Thus, in this case the court admitted surrounding circumstances because in its opinion the meaning of the contract was not free from doubt.

In *Middleworth* v. *Ordway* (*supra*), the court said at page 414:

> *"Whether we ignore the word 'dower' altogether as meaningless,* or give it the definition that the parties gave it by using the phrase which they regarded as equivalent in meaning, the same result follows."

Hence, a resort was there had by the court to the surrounding circumstances, because, otherwise, the word "dower" would be meaningless.

In *U. S.* v. *Chamberlin* (*supra*), the court did not discuss the parol evidence rule at all. This court there considered the right of the Government to recover a personal judgment for stamp tax and whether an action for

debt could or could not be brought for its recovery. In that connection this court held that a tax would be a debt in the sense of common law if the statute creating the tax at the same time creates a personal obligation to pay the same. The case has no bearing whatever on the point involved in this appeal.

Price v. *U. S.* (*supra*), was a case similar to the Chamberlin case and the parol evidence rule was also not discussed by this court therein.

A careful reading of the opinion of the court in *Central Coke & Coal Co.* v. *Good & Co.* (*supra*), failed to disclose any reference therein to the parol evidence rule.

In several parts of its brief respondent argues at great length that it was necessary for the New York banks to indicate in some manner that the payments they desired to make were for the benefit of the petitioners.

> "How other than by the use of the words 'for account' could Goldman, Sachs have indicated to the bankrupts the name of the firm having an 'account' with them for whose benefit the check was being transmitted."

This court, of course, is not concerned with guessing what the New York banks could have said upon that occasion. We have shown in our main brief (pp. 12 to 18), that when words having a settled legal and commercial meaning are used they are presumed to have been used in that settled legal and commercial sense.

The court will also bear in mind that the transaction herein occurred between banks and the banks would naturally be presumed to know the banking and the legal import of the expressions used by them. In no sense they could be considered as laymen.

There are many expressions that the New York banks could have used which would not have restricted the beneficial interest in the checks herein, delivered by them to the bankrupts. We may suggest some of such expressions:

"We are paying the amounts of the checks herewith enclosed to Messrs. A. Latzko and N. Popper, of Budapest."

"Please credit the amount of the enclosed checks to A. Latzko and N. Popper, of Budapest."

"We are enclosing our checks in payment to Messrs. A. Latzko and N. Popper, of Budapest."

"Please acknowledge the receipt of our checks delivered to you by order of Messrs. A. Latzko and N. Popper, of Budapest."

"Please have the account of Messrs. A. Latzko and N. Popper, of Budapest, credited with the amount of the enclosed checks."

"Enclosed please find our checks, as per order of Messrs. A. Latzko and N. Popper, of Budapest."

"We are instructed by Messrs. A. Latzko and N. Popper, of Budapest, to remit to you the amount of the enclosed checks."

If, instead of using any of the above stereotyped sentences, the banks had used restrictive instructions, instructions that were not and are not ambiguous, no duty is thereby cast upon this court to change those instructions in the sense directly contrary to that given to them by settled legal and banking interpretation.

C.

The so-called "surrounding circumstances", relied upon by the respondent, do not oppose the restrictive meaning of the expressions "account of" and "favor of" used in connection with the checks herein.

The surrounding circumstances relied upon by the respondent which changes settled legal and banking meaning of expressions "account of" and "favor of" used in connection with the checks herein, are these: That the

deposit was made herein by the New York banks in the ordinary checking account of the petitioners with the bankrupts; that the instructions to place it in such an account emanated from petitioners (see its Brief p. 31).

The idea that the New York banks acted as the agents of the petitioners originated through an obvious error of the Circuit Court of Appeals in misreading the reclamation petition herein. The Court of Appeals stated in its opinion:

> "The petitioners state they caused Goldman, Sachs & Company, *as their agents*, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners. This they did *as the agents* of the petitioners" (R., 84).

The paragraph in the reclamation petition which the court had in mind, is the Ninth reading as follows:

> "NINTH.—That on June 15, 1923, and on the same day as said petition in bankruptcy against said K. N. & K. was filed and said temporary Receiver was appointed, as aforesaid, petitioners caused Goldman, Sachs & Company to deliver to said K. N. & K., a check for Fifteen thousand ($15,000) Dollars, to be collected by said K. N. & K. for the account of petitioners, as aforesaid. That upon said date, petitioners likewise caused the National City Bank of New York to deliver to said K. N. & K. a check for One thousand two hundred and ninety-four ($1,294) Dollars, to be collected by said K. N. & K. for the account of petitioners, as aforesaid" (R., 8).

The court will see that the petitioners never asserted that they caused the New York banks to act *"as their agents"*. No such conclusion is warranted by the legal

interpretation of the word "caused". We have made a thorough search of the authorities and find none that permit said construction of said verb, as customarily used *in pleadings*. The Circuit Court of Appeals for the Ninth Circuit held that the verb "caused" means "occasioned" in

> *Williamsborough City Fire Insurance Co.* v. *Willard*, 164 Fed., 404, 406;
> *Hamilton* v. *Williamsborough City Fire Insurance Co.*, 157 Fed., 280, 284.

In *Louisville & N. R. Co.* v. *Smith*, 50 South, 241, 244, the court construed the verb "caused" used in a pleading as equivalent to "allowed."

In *Carroll* v. *Allen*, 27 Atl., 704, 705, the court said, speaking of the complaint:

> "*We do not think the word 'caused' in the above connection, necessarily implies active and affirmative misconduct* on the part of the town, its servants and agents, as contended by defendant's counsel. In other words, *we do not think it necessarily means that the town actually dug, or caused to be dug, in said highway, the hole in question*, but simply that the negligence of said town *resulted in or caused*, the defect in question, and hence that the objection thereto was not well taken."

The record conclusively shows that Goldman-Sachs & Company delivered their check for $15,000 by order of Julius Baer & Company, Zurich, Switzerland, in accordance with cable instructions from the latter (R., 31). The check of the Irving Bank-Columbia Trust Company was delivered to the bankrupts by order of Pester Ungarische Commercial Bank, Budapest, Hungary. We may assume that the National City Bank delivered its check to the bankrupts also by reason of similar instructions from one of its correspondent banks abroad. If any presumption

induced by the said facts is to be indulged in, it is that when checks are delivered to the payee or to his agents, such checks are intended to discharge some debt or obligation to such payee of the drawer thereof or of the party by whose order the checks were drawn.

Nay v. *Curley,* 113 N. Y., 575, 577;
Marks v. *Kellogg,* 170 A. D. (N. Y.), 464, 468: affirmed 220 N. Y., 615.

The second alleged "enlightening circumstance" relied upon by the respondent is the fact that the petitioners had a current checking account with the bankrupts. We are unable to see how this point in any way affects the right of a depositor or of third parties to make deposits to his account of negotiable paper accompanied by restrictive instructions, retaining the title in him until said negotiable instruments are collected by his bank through the clearing house.

Respondent asks that if petitioners delivered to the bankrupts actual cash money, for their account, would that deposit create any other relationship than that of debtor and creditor. The answer clearly is, no. But this answer does not depend on the fact that the petitioners had a current checking account with the bankrupts. It depends upon *the nature* of the deposit. When *cash money* is deposited or negotiable instruments are deposited *as cash money,* the relationship of debtor and creditor immediately arises. When negotiable instruments accompanied by restrictive instructions are deposited, the relationship of debtor and creditor does not arise between the depositor and his bank, until *"such bank performs the dual function of collecting and crediting"* (*American National Bank* v. *Miller,* 229 U. S., 517, 520). In the case at bar before the bankrupts performed this "dual function", to wit, before they collected the checks in question through the New York Clearing House, they failed and the proceeds of said checks never became part of bankrupts' es-

tate. Hence, the petitioners are entitled to reclaim the same in full from the trustee in bankruptcy.

It is further urged upon this court that depositor cannot retain the title to his deposit of negotiable instruments by stating that said deposit is "for his account". The contrary was repeatedly held both in this country and in England.

In *Lee* v. *Chillicothe Branch Bank* (No. 8186), 15 Fed. Cas., the District Court said, at pages 150-151:

> "Without stopping to analyze the many cases referred to, in which endorsements have been held to be restrictive in their character, as suspending the farther negotiability of commercial paper, the following instances may be briefly stated: '*pay to my use*', * * * '*pay the money to my servant for my use*,' * * * Chitt. Bills, 176, 177; Pyles, Bills 121 (marginal paging); Edw. Bills & N. 277, 278; Stor., Bills, Par. 211; 2 Burrows, 1227; Doug. 637; 8 Taunt., 100; 15 E. C. L., 319; 3 Mass., 227; 5 Mass., 544."

On appeal, the Circuit Court said (No. 8187), 15 Fed. Cas., at page 152:

> "Whether an endorsement be restrictive or not, depends upon the intention of the parties as expressed, 'pay to A for *my account*' 'pay the contents to *my use*'; 'pay to A. B., or order, for *my use*,' 'pay to A. B. for *my account*'; 'pay the money to *my use*'; 'pay the money to my servant for *my use*,'—these are specimens from cases where the endorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of restructions, the negotiability of the bill ceases. * * *"

There is not a *scintilla* of evidence in the record that any of the New York banks knew that the petitioners had

a current checking account with the bankrupts. On the other hand, it may be safely assumed that the shaky financial position of the bankrupts was known to the New York banks and they purposely used restrictive instructions when delivering their checks in order to safe-guard the interest of the petitioners in view of the impending bankruptcy of Knauth, Nachod & Kuhne.

In the *White* case, *supra*, this court held that the restrictive meaning of the words "for account of" is unquestionable, contains no ambiguity and cannot be contradicted either by parole evidence or by custom. We submit that no amount of speculative inferences may change the plain meaning of these words.

Mr. Justice Lehman (now of New York Court of Appeals), said in *Baranowsky* v. *Guaranty Trust Co.*, New York Law Journal, November 12, 1921:

> "It has been frequently held that an endorsement of a negotiable instrument 'for the account' of the indorser makes the indorsee not the full owner of the instrument, but merely the indorser's agent for collection. *From the very nature of the contract embodied in the negotiable instrument these words can have no meaning except that the party primarily liable on the instrument should pay them over only for the benefit of the person making the restrictive endorsement.*"

We refer this court to Point I in our main brief (pp. 12 to 18) where this aspect of the case is discussed at length and many authorities are cited in support of the standpoint of the petitioners.

Attempts to vary and explain said meaning have been made in the past and have uniformly failed. Thus, in *Sigourney* v. *Lloyd*, 8 Barnwell & Cresswell, 622, the court said per Lord Tenterden, at page 631:

> "It has been said that the endorsement 'pay to Williams for my use,' is a mere direction to Williams

to apply the money reduced by the bill to Sigourney's use; but the words taken in that sense would be useless; for whether the words be on the face of the endorsement or not, as soon as Williams received the proceeds of the bill, he must necessarily apply them to Sigourney's use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of having the first indorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original indorser."

On appeal, Lord Chief Justice West said in 3 Moore & Payne, at page 229:

"No inconvenience can possibly arise to the commercial interests of the country by limiting the operation of an endorsement so expressed. The only effect will be to make persons more cautious in transactions of this nature in the future."

Conclusion.

We may sum up the result of the foregoing discussion by stating that this court is called upon to decide in the case at bar, the two following main propositions:

1. Whether it is proper to import into the expressions "account of" and "favor of", having settled legal and banking unambiguous meaning, a sense contrary to its said settled restrictive effect, particularly where the record contains no facts opposing said restrictive meaning.

2. Is there a relationship of debtor and creditor or principal and agent between a depositor residing in Budapest, Hungary, and having a current checking account with a New York bank, when the depositor was not advised that certain checks were deposited for his benefit

with said New York bank; and said depositor had no agreement with said New York bank to treat the deposits of negotiable instruments to his account with said bank as deposits of cash, or as an immediate credit, never in fact treated any negotiable instruments deposited by him or in his behalf with said bank as cash, or as an immediate credit; never drew upon his said bank before the collection by said bank of negotiable instruments so deposited to his account, as aforesaid; at the time of the deposit of the negotiable instruments involved herein, he was not indebted to said New York bank but had a credit balance; and in this particular instance, did not desire an immediate credit and did not draw before the collection of the check herein involved by said bank immediately upon the deposit thereof.

We submit that the first of these questions should be answered in the negative and the second to the effect that the relationship of the principal and agent prevailed.

The judgment of the Circuit Court of Appeals should be affirmed in so far as it granted the reclamation claim of the petitioners to the proceeds of the check of the National City Bank, and should be reversed in so far as it denied said claim as to the proceeds of the check of Goldman-Sachs & Co.

Respectfully submitted,

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(46529)